

Claimant appeals and asks the Board to find that claimant's need for medical care is the result of his work-related injury on January 20, 2011. He argues the SALJ erred by

considering the third report of Dr. Paul Stein for reasons set forth below in the Findings of Fact. Respondent admits an incident occurred at work on January 20, 2011, but contends the incident did not cause injury to claimant or any necessity to cure and relieve a nonexistent injury. It argues there is no jurisdictional issue for the Board to review. If the Board does have jurisdiction, respondent asserts claimant failed to prove by a preponderance of the evidence that he was entitled to additional medical treatment.

The issues before the Board are:

1. Does the Board have jurisdiction to review the issues raised by claimant on appeal?
2. If the Board has jurisdiction to review the issues raised by claimant, did the SALJ err by considering the third report of Dr. Paul Stein?
3. If the Board has jurisdiction to review the issues raised by claimant, did claimant suffer a personal injury by accident?
4. If the Board has jurisdiction to review the issues raised by claimant, is claimant entitled to additional medical treatment?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Claimant testified that right after his morning meeting at work on January 20, 2011, he observed a fellow employee pinned underneath a large jack used to raise mobile homes. Claimant lifted the jack enough so his fellow employee could be freed. Claimant experienced pain in his back from moving the jack. Following the incident, claimant finished his shift and continued working for respondent. Claimant last worked for respondent in February 2011, when he quit to take another job.

According to claimant, he was authorized to see Dr. Timothy R. Pauly. Dr. Pauly saw claimant on January 24, 31 and February 15, 2011. On January 24 Dr. Pauly gave claimant a prescription for Lortab, and he later referred claimant to Dr. Kris Lewonowski with the Kansas Orthopaedic Center. On February 15, Dr. Pauly gave claimant another prescription for Lortab. Later that same day, Dr. Pauly discovered claimant had a prescription for Lortab from another physician. Dr. Pauly also learned he was not authorized by respondent to see claimant on February 15. Dr. Pauly dropped claimant as a patient and notified Dr. Lewonowski's office of the Lortab incident.

Dr. Lewonowski saw claimant once on March 7, 2011. Dr. Lewonowski's note indicated claimant wanted a better medication than Lortab. Dr. Lewonowski's impressions

were post laminectomy and discectomy syndrome at L5-S1 with degenerative disc disease and facet arthropathy. He prescribed claimant a few Lortab pills. The Kansas Orthopaedic Center's records contain a notation by Mary Jo Roberts dated March 7, 2011, that she received a call from Target Pharmacy that claimant presented Dr. Lewonowski's prescription, but that claimant had less than 30 days earlier had a 30-day prescription from Dr. Pauly filled. Consequently, Dr. Lewonowski also quit seeing claimant as a patient.

Prior to the incident on January 20, 2011, claimant had a history of low back problems and drug problems. On January 13, 2006, claimant saw his family physician, Dr. Gregory M. Thomas. Dr. Thomas noted that claimant had degenerative disc disease with a ruptured disc as well as narcotic issues. He indicated claimant had used methamphetamine in the past and had received prescriptions for Oxycontin.

On February 2, 2006, claimant underwent a right L5-S1 microdiscectomy by Dr. Manguoglu. On October 27, 2009, claimant began seeing his current primary care physician Dr. Lamont Bloom for back pain. Dr. Bloom prescribed claimant Lortab on October 27, 2009, and February 3, May 13 and August 12, 2010. Claimant acknowledged that in December 2010 he asked Dr. Bloom about having another back surgery. Claimant admitted his back pain was ongoing in 2009 and 2010. However, he indicated that the injury he sustained on January 20, 2011, was eight inches above his previous low back problems.

On June 30, 2011, at the request of his attorney claimant was seen by Dr. George G. Fluter. Dr. Fluter physically examined claimant and reviewed claimant's medical records dating back to 1988. Dr. Fluter assessed claimant with: (1) status post work-related injury, January 20, 2011; (2) low back pain; (3) lumbosacral strain/sprain; (4) myofascial pain affecting lower back; (5) possible lumbar discopathy and (6) possible right lower extremity radiculopathy. Dr. Fluter opined that within a reasonable degree of medical probability, there was a causal/contributory relationship between claimant's current condition and his injury of January 20, 2011.

After the August 19, 2011, preliminary hearing, SALJ Nelson issued an Order on September 20, 2011, wherein he found claimant sustained an accidental injury on January 20, 2011, which required medical attention. He also appointed Dr. Paul Stein, a neurosurgeon, to examine claimant and to conduct such tests as he deemed necessary to assist in diagnosing and forming an opinion as to whether claimant was presently in need of medical care as a result of his injury on January 20, 2011. SALJ Nelson instructed the parties to write an agreed letter to Dr. Stein and also instructed them on what to include in and with the letter. SALJ Nelson instructed the parties not to have any contact with Dr. Stein until after they received his report. Neither party appealed SALJ Nelson's September 20, 2011, Order.

Claimant was examined by Dr. Stein on November 10, 2011. Dr. Stein also reviewed claimant's medical and chiropractic records dating back to 1988. Claimant

reported he had previous back problems, but that after the January 20, 2011, incident, his back pain was a little higher in his back. Dr. Stein in his report stated,

Mr. Phillips appears to have two problems which feed into each other; 1. A tendency toward narcotic abuse. 2. Chronic low back pain. The records of Dr. Bloom document the presence of low back pain for which such medication was being prescribed prior to the incident at work and as late as 12/20/10, one month before the incident at work.¹

Dr. Stein ordered x-rays of the lumbar spine and a lumbar MRI scan, which were conducted on December 22, 2011. In a supplemental report dated December 28, 2011, Dr. Stein stated claimant had: (1) moderately severe degenerative change at L5-S1 with very slight posterior listhesis at that level, but no change on flexion-extension, (2) disk desiccation from L2-L3 through L5-S1, (3) mild degenerative changes above L5-S1 and (4) a sacral Tarlove cyst. Dr. Stein testified that after reviewing the x-rays and MRI, he could not document any evidence of a structural change in claimant's lower back. He recommended steroid injections and physical therapy with strengthening. He also noted his opinions of November 10, 2011, had not changed.

On January 10, 2012, Dr. Stein responded by letter to a letter he received from respondent's attorney asking about causation. Dr. Stein stated,

In my opinion the predominance, if not all, of the patient's current pain is related to his pre-injury pathology and status. There is no documentation that Mr. Phillips requires any specific treatment for the back subsequent to his work incident that would not have been appropriate prior to the incident.²

At Dr. Stein's deposition, claimant's attorney objected to Dr. Stein's letter dated January 10, 2012. The basis of the objection was that the letter was procured by respondent without the knowledge, consent or input from claimant's attorney. Respondent's attorney replied that he did not contact Dr. Stein until after his report was submitted to the SALJ. Therefore, he contends he did not violate the September 20, 2011, Order of SALJ Nelson.

In his preliminary Order of May 21, 2012, SALJ Nelson admitted the January 10, 2012, letter of Dr. Stein as part of the record. SALJ Nelson extensively discussed Dr. Stein's findings and opinions and ultimately determined claimant was not in need of additional medical treatment as a result of his injury on January 20, 2011.

¹ Stein Depo., Ex. 2 at 6.

² *Id.*, Ex. 2 at 10.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.³ “Burden of proof’ means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.”⁴

The Board's jurisdiction to review preliminary hearing findings is statutorily created by K.S.A. 44-534a. The statute provides the Board may review those preliminary findings pertaining to the following: (1) whether the employee suffered an accidental injury; (2) whether the injury arose out of and in the course of the employee's employment; (3) whether notice was given or claim timely made; and (4) whether certain defenses apply. The Board also has jurisdiction to review preliminary hearing findings if it is alleged the administrative law judge exceeded the judge's jurisdiction. See K.S.A. 2010 Supp. 44-551.

In his September 20, 2011, Order, SALJ Nelson determined claimant met with personal injury by accident on January 20, 2011, and neither party appealed. Therefore, the only question is whether claimant is in need of additional medical treatment as a result of his work-related injury on January 20, 2011. That issue is not one the Board has jurisdiction to review under K.S.A. 44-534a. Nor can this Board Member find that SALJ Nelson exceeded his jurisdiction. The Board has consistently ruled in similar factual situations that the ALJ did not exceed his or her authority.⁵

Similarly, K.S.A. 44-534a does not give the Board jurisdiction to review whether the SALJ erred in admitting Dr. Stein’s letter dated January 10, 2012. The Board has no jurisdiction to review an ALJ’s evidentiary rulings in a preliminary hearing. See *Ogden*⁶ and *Arriaga*.⁷ Nor did the SALJ exceed his jurisdiction in admitting the letter into the record.

³ K.S.A. 2010 Supp. 44-501(a).

⁴ K.S.A. 2010 Supp. 44-508(g).

⁵ *Sneed v. Burlington Coat Factory*, No. 265,468, 2002 WL 31602597 (Kan. WCAB Oct. 11, 2002); *Deege v. Larned State Hospital*, No. 1,040,271, 2009 WL 298358 (Kan. WCAB Jan. 14, 2009); *La Porte v. N. Central KS. Special Educ. Coop.*, No. 1,054,714, 2012 WL 758307 (Kan. WCAB Feb. 15, 2012).

⁶ *Ogden v. Evcon Industries, Inc.*, No. 230,945, 1998 WL 381567 (Kan. WCAB June 23, 1998).

⁷ *Arriaga v. National Beef Packing Company*, No. 1,057,163, 2011 WL 7012264 (Kan. WCAB Dec. 16, 2011).

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.⁸ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁹

CONCLUSION

When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.¹⁰ Accordingly, claimant's appeal is dismissed.

WHEREFORE, the undersigned Board Member dismisses the appeal, which leaves the May 21, 2012, preliminary hearing Order entered by SALJ C. Stanley Nelson in full force and effect.

IT IS SO ORDERED.

Dated this ____ day of August, 2012.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
firm@raresq.com

Douglas D. Johnson, Attorney for Respondent and its Insurance Carrier
johnson.djlaw@gmail.com

C. Stanley Nelson, Special Administrative Law Judge

⁸ K.S.A. 44-534a.

⁹ K.S.A. 2011 Supp. 44-555c(k).

¹⁰ See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).